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Supreme Court of the United States

OCTOBER TERM, 1955.

No. _____.

E. L. BRIDE, INDIVIDUALLY, AND E. L. BRIDE, TRANSFEREE, AND E. L. BRIDE COMPANY, BY E. L. BRIDE, TRUSTEE, PETITIONERS,

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Your petitioners respectfully file this petition for a Writ of Certiorari directed to the United States Court of Appeals for the 8th Circuit, to bring before the Supreme Court, the case of E. L. Bride, individually, and as Transferee, and E. L. Bride Company, by E. L. Bride, Trustee, Petitioners, vs. Commissioner of Internal Revenue, Respondent # 15,084.

OPINIONS BELOW.

The opinion of the Court of Appeals appears in the original record (R. 101). The Tax Court opinion is set out at page 85 thereof.

JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was entered July 8, 1955 (R. 101, 113). Petitioner's petition for rehearing was denied August 1, 1955 (R. 133). The Jurisdiction of this Court is invoked under Title 28, U. S. C. 1254 (1). See also Rule 19 B, Supreme Court Rules.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals in reviewing a decision of the Tax Court where all the pertinent facts were agreed to by stipulation, and no facts were controverted, erred in failing to review the evidence and draw its own conclusions and inferences therefrom, as in the case of an appeal of a civil case tried without a jury as provided by Section 26, U. S. C. 1141, or whether the Court can refuse to "weigh the evidence, draw inferences from it and declare the result" as not being a function of that Court.

2. (a) Whether a corporation which distributed all its earnings in liquidation under Section 26, U. S. C. 27 G, on March 31, 1949, can be penalized under Section 102 for "permitting its earnings to accumulate instead of being distributed," in a proceeding instituted some two years later on March 1, 1951, and,

(b) Whether all earnings included in a liquidating distribution under Section 27 G are to be credited in determining the surtax liability of a corporation under Section 102 of the Internal Revenue Code.

3. Whether the Court below erred in failing to consider the undisputed facts, and in failing to find that the E. L. Bride Company did not accumulate its profits beyond the reasonable needs of its business and that it did not prevent the imposition of surtax upon its shareholders through the medium of permitting its earnings to accumulate instead of being distributed.

STATUTES AND REGULATIONS.

Internal Revenue Code of 1939.

Section 27 (26 U. S. C., 1952 Ed., Sec. 27).
Section 102 (26 U. S. C., 1952 Ed., Sec. 102).
Section 1141 (26 U. S. C., 1952 Ed., Sec. 1141).
Regulations 111: Secs. 29, 27 G.

They appear in the Appendix pp. A1-A6.

STATEMENT.

This case presents no issues of fact since the pertinent facts were agreed to by stipulation and all facts not included in the stipulation were not controverted.

On March 1, 1951, the Commissioner of Internal Revenue made a determination that the E. L. Bride Company was, "availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting earnings or profits to accumulate instead of being distributed, in violation of Section 102 of the Internal Revenue Code," for the fiscal year ending

July 31, 1948 (R. 10). Surtax penalties of $163,595.55 were assessed against the company and E. L. Bride as transferee. Two years before this (March 31, 1949) the company had been legally dissolved and all its assets (including all the earnings in question) distributed to E. L. Bride, its principal stockholder (R. 41) who paid all taxes due thereon in the sum of $191,375.65 (R. 24). The Commissioner's determination was affirmed by the Tax Court and the Court of Appeals.

I.

The Tax Court in its opinion failed to consider all the stipulated and undisputed facts which petitioners contend conclusively established that the company did not unreasonably permit its earnings to accumulate, and that it did not retain its earnings to avoid taxes on its shareholders. The Court of Appeals refused to consider the facts as in a civil action tried without a jury, as required by Title 26, U. S. C. 1141 (amended June 25, 1948), which provides for a review of the Tax Court's decision by Courts of Appeals "in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury" but decided the case under the law as it existed prior to the 1948 amendment. The Court stated in its opinion that "to weigh the evidence, draw inferences from it and declare the result is not the function of this Court" (page 5). In so doing its decision is in conflict with the law (26 U. S. C. 1141) and other decisions of the Courts of Appeals as hereinafter referred to, and due process of law in the determination of its appeal was denied to petitioner.

II.

The E. L. Bride Company was legally dissolved March 31, 1949, and all of its earnings which had been accumu-

lated since February 28, 1913, were included in a liquidating distribution to petitioner E. L. Bride. This was duly reported to the Treasury Department on the required forms and Mr. Bride included it in his 1949 tax return and paid the full amount of the taxes due thereon in the sum of $191,375.65 (R. 24).

The Revenue Act (26 U. S. C. 27 G) relating to distributions in liquidation provides that in the case of amounts distributed in liquidation "the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall for the purpose of computing the basis surtax credit * * * be treated as a taxable dividend paid."

The distribution in question included all the earnings of the company accumulated after February 28, 1913, but the Court did not treat it as a taxable dividend paid. Had it done so, there would have been no undistributed earnings and no Section 102 penalties applicable.

The Court in refusing to apply Section 27 G held that the credit was only applicable to current rather than accumulated earnings, and such distribution had to be made during the taxable year. In so holding the Court failed to give effect to the statute and its opinion contravenes the decision of this Court in *Helvering* v. *Credit Alliance Corporation*, 316 U. S. 107, 62 S. Ct. 989, and is in conflict with opinions of other courts of appeals.

Commissioner v. *Kay Manufacturing Company*, 122 F. 2d 443 (C. A. 2).

Pembroke Realty and Securities Corp. v. *Commissioner*, 122 F. 2d 252 (C. A. 2).

III.

The opinion fails to adequately state the undisputed facts upon which many of the asserted errors are based,

and in the vital matter of company profits, the opinion grossly overstates such profits contrary to the stipulated facts. Detailed references to the record are therefore made.

In its opinion (R. 104) the Court refers to "the Company's accumulating without distributing profits of $698,-088.17 in cash, and $170,660.46 in receivables in the year ended July 31, 1948," a total of $868,748.63. Its actual profits as agreed to by the parties were $453,440.44 which included the receivables of $170,660.46 (R. 82). A similar error appears in its recital of profits on March 31, 1949, which were $116,317.52 (R. 11) instead of $784,806.46 in cash and $129,720.88 in receivables as indicated by the Court (R. 104).

The undisputed facts show that E. L. Bride Company was a wholesaler of petroleum products which it purchased in large quantities on a cash basis direct from the refineries (R. 25, 30) and which it in turn sold to its customers in small lots on credit of from 30 to 120 days (R. 25, 31). It had to have cash for its purchases from the refineries as such purchases could not be financed through bank loans or other credit arrangements (R. 26, 30). For the fiscal year in question, its annual purchases were $5,-915,299.35 or an average of $492,941.61 per month (R. 45). Operating expenses had averaged $14,276.29 per month, making a total monthly expenditure of $507,217.90.

The company's balance sheet as prepared by a certified public accountant who audited its books and prepared its tax return, showed the following fixed assets and liabilities as of July 31, 1948, the end of the fiscal year in question (R. 82):

ASSETS		LIABILITIES	
Cash	$698,088:17	Capital Stock	$ 25,000.00
Accounts Rec.	170,660.46	Taxes	289,846.19
Misc.	2,342.45	Accounts Payable	102,620.10
		Misc.	184.35
		Earned Surplus	453,440.44
	$871,091.08		$871,091.08

The Court in affirming the Tax Court's ruling made no allowances for the fact that this surplus had actually been distributed March 31, 1949 (two years before any charge by the government), and a tax paid thereon in the sum of $191,375.65 (R. 24).

The Court also overlooked the fact that the surplus was not all cash available for distribution, but included $170,660.46 in accounts receivables (R. 82) which the company would not receive for 30 to 120 days (R. 25, 31). After deducting the accounts receivable the company had cash on hand of $282,844.48 with which to meet its current and contingent obligations. These contingent obligations were likewise undisputed and represented:

1. Purchase commitments to the refineries for oil for immediate delivery totaling $553,395.00 for which it would have to pay cash (R. 29).

2. An outstanding commitment to the Grubbs Tank Line of Mercedes, Texas, to purchase 37 Tank cars for $222,000.00. During the year the company had rented these cars paying total tank car rentals of $49,333.28 (R. 29).

3. Three legal claims totaling $61,402.96 in which the company was involved which resulted in litigation as follows:

(a) $38,330.70 claimed by the Kansas City Power and Light Company in suit No. 530,694, in the Circuit Court of Jackson County, Missouri (R. 32).

(b) $18,158.07 claimed by the City of Slater, Missouri, in a suit filed in the Circuit Court of Saline County, Missouri (R. 32).

(c) $4,916.19 claimed by Ritter and Rundel in a suit filed in the District Court of the United States at Kansas City (R. 32).

4. In addition the company was making plans for the construction of oil storage tanks and truck delivery facilities which were abandoned when steel shortages made it impossible to obtain steel (R. 34).

The company's ratio of assets to fixed liabilities was 2.21 to 1 which has been accepted by the Tax Court in other cases as a reasonable and proper ratio. If the contingent liabilities be considered, they would have erased all the company's surplus. Its cash on hand of $282,844.48 was only sufficient to pay its expenses for twenty days.

Its monthly bills for five of the preceding twelve months exceeded its receipts (R. 80). All of the company's assets consisted of its cash and accounts receivable and were used exclusively in its business. It had no investments in outside or unrelated fields. There were no personal loans or advancements to its officers or stockholders.

A certified public accountant completed an audit of its affairs, prepared and filed its income tax return for the fiscal year in question on October 14, 1948.

On March 1, 1949, after considering the matter for some time the shareholders voted to dissolve the corporation (R. 35, 36). The dissolution was completed March 31, 1949, in accordance with the Missouri laws (R. 41) and

a final liquidating dividend of $594,812.46 which included all the company's accumulated earnings and capital (R. 71, 79), was distributed to E. L. Bride and reported by him in his income tax return for the year 1949, and all taxes duly paid thereon.

The Company paid taxes for the fiscal year ending July 31, 1948, in the sum of $277,948.51 (R. 45) and $71,-291.37 for the period ending March 31, 1949 (R. 82). In addition, Mr. Bride paid personal income taxes in the year 1948 of $7,381.92 and $191,375.65 in 1949, when the liquidating distribution was received, making a total of $547,-997.45 paid in taxes by the company and Bride during this period. On March 1, 1951, the Commissioner mailed notice to the Company assessing surtaxes of $153,595.55 for the fiscal year 1948 for failure to distribute the profits (R. 13) which had, in fact, been distributed March 31, 1949, some two years earlier. A liability of $33,782.25 in surtaxes for the taxable period from August 1, 1948 to March 31, 1949, was also claimed. Pending the decision in the Tax Court, the Commissioner conceded that there was no surtax liability for this latter period (R. 78).

The Commissioner did not contend at any time that the Company was formed for the prohibited purpose of accumulating earnings under Section 102 (R. 10, 85).

The Tax Court upheld the claim for surtaxes for the period ending July 31, 1948, in the sum of $164,595.65. This judgment was affirmed by the Court of Appeals July 8, 1955 (R. 101). Petitioner's motion for rehearing was overruled August 1, 1955 (R. 133).

It is the contention of petitioners that had the Court of Appeals taken into account the undisputed and stipulated facts as required by the Code and the Rules of this Court, that such facts would have compelled the conclu-

sion that the Company's earnings were necessarily and properly retained for use in its business and were not accumulated in an unreasonable amount, and that there was no intention of withholding its earnings so as to prevent the imposition of surtax upon its shareholders.

SPECIFICATIONS OF ERRORS.

The Court of Appeals erred—

1. In failing to review the decision of the Tax Court in the same manner and to the same extent as decisions of the District Court in a civil action tried without a jury as prescribed by 26 U. S. C. 1141, and in failing to consider the undisputed and stipulated facts in the case and draw its own conclusions and inferences therefrom.

2. In failing to hold that the E. L. Bride Company was entitled to credit under Section 102 for its earnings which were included in the liquidating distribution of March 31, 1949, in accordance with the express provisions of 26 U. S. C. 27 G.

3. In holding (a) that the company's accumulation of earnings as of July 31, 1948, was unreasonable, and (b) that it wrongfully withheld the distribution of its earnings for the purpose of preventing the imposition of surtaxes upon its stock holders.

REASONS FOR GRANTING THE WRIT.

I.

Prior to the amendment of 26 U. S. C. 1141 on June 25, 1948, the Code limited appellate review of Tax Court decisions to errors of law and the determination of whether

there was any evidence to support the Tax Court's decision. The Court could not weigh the evidence or draw its own conclusions from it. The Court of Appeals applied the old law in ruling the instant case as evidenced by its statement that (page 5 of its opinion R. 101)

> "To weigh the evidence, draw inferences from it and declare the results, is not the function of this Court."

In support of its position, the Court cited *Helvering* v. *National Grocery Company*, 304 U. S. 282, decided in 1938 by this Court under the old law which was expressly changed by the 1948 amendment. At that time, appellate review of Tax Court decisions was limited to power "to affirm or, if the decision of the Board is not in accordance with the law, to modify or to reverse the decision of the Board." Thus the petitioner was denied the benefit of the full consideration of his case upon the agreed facts by the Court, and its decision not only is in conflict with the Code, but is also in conflict with decisions of other Courts of Appeals.

In *Wright Bernet* v. *Commissioner of Internal Revenue*, 172 F. 2d 343 (6 C. A.), the court said, l. c. 345:

> "In considering this question, we have jurisdiction to review the decision of the Tax Court in the same manner and to the same extent as a decision of the District Court in Civil Actions without a jury."

In *Gillette's Estate* v. *Commissioner of Internal Revenue*, 182 F. 2d 1010 (6 C. A.), the Court in reviewing a decision of the Tax Court said, l. c. 1013:

> "* * * It has been said in cases appealed from Districts Courts that within certain limits we are free, that is we have the power (and we would suppose the duty) to draw such inferences or conclusions as

> we deem proper * * *. Since Internal Revenue Code 1141 has been amended to provide that reviews from the Tax Court shall be in the same manner and to the same extent as decisions of the District Court in civil actions tried without a jury, what we have just said is germane here."

See also:

Grace Bros. v. *C. I. R.*, 173 F. 2d 170 (9 C. A.).
McGah v. *Commissioner of Internal Revenue*, 210 F. 2d 769 (9 C. A.).
Chicago Title & Trust Company v. *U. S.*, 209 F. 2d 773 (C. A. 7).

The old rule is so firmly implanted in the Federal Judiciary as a result of decisions by this Court in *Helvering* v. *National Grocery Company, supra, Dobson* v. *Commissioner of Internal Revenue*, 64 S. Ct. 239, 320 U. S. 489, and other similar rulings, that this Court in the interest of uniformity should settle this important question of Federal law by its decision in this case.

As stated by this Court in *Hormel* v. *Helvering*, 61 S. Ct. 719, 312 U. S. 552, l. c. 555,

> "Rules of practice and procedure are devised to promote the ends of justice."

Certainly when adopted by Congress, such rules should be uniformly followed by our Courts.

Our Federal Courts now handle large numbers of tax cases. They should be dealt with on a uniform basis in all the Courts of Appeal, and we respectfully submit that this will not be done until this Court has settled the question of their jurisdiction and duties in the disposition of appeals from the Tax Court.

II.

It is conceded that all of the earnings of the Company for the year in question were included in the liquidating distribution of March 31, 1949. This was duly reported to the Treasury Department on its regular form and the amount included by Mr. Bride in his 1949 income tax return, and that he paid the taxes due thereon in the sum of $191,375.65.

Such distributions under the law are entitled to credit in the determination of surtax liability by Section 27 G, Title 26, as follows:

> "(g) DISTRIBUTIONS IN LIQUIDATION—in the case of amounts distributed in liquidation the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall, for the purpose of computing the basic surtax credit under this section, be treated as a taxable dividend paid."

This section is the only one in the Revenue Code relating to liquidating distributions and it is an exception to the general provisions relative to ordinary corporate dividends. The law recognizes that a liquidating distribution is not a dividend, but this section requires that for the purpose of Section 102 credit, it shall be treated as a "taxable dividend paid."

There are but two limitations fixed by the statute for its allowance as such credit. It must be a distribution in liquidation and it must involve earnings accumulated after February 28, 1913. Both conditions were fully complied with in the instant case.

However, the Court below held that in order to qualify for such credit the distribution must be made

during the tax year, thereby adding a limitation which is not found in the statutes and in effect limiting the credit entirely to earnings accumulated during the year in which the distribution is made. The statute specifically provides, "that part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913 * * * shall be treated as a taxable dividend paid."

Had Congress intended to limit the credit to current earnings only, it would have been easy to have so provided in the statute, and the fact that the statute specifically states that the "part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913," would indicate the congressional intent that any profits, regardless of when they were earned, if accumulated after February 28, 1913, are to be credited.

There are no decisions supporting the Court's construction of the statute, and the few times that it has been before the Courts, the unanimous rulings are that the section categorically means that any distribution in liquidation is entitled to credit.

In *Helvering* v. *Credit Alliance Corporation*, 316 U. S. 107, 62 S. Ct. 989, this Court held that this provision specifically applied to all distributions in liquidation and that its effect was not limited where the distribution was made to a corporate transferee in whose hands it did not represent taxable income. The facts show that the liquidation in question began in 1936 and was finally completed in 1938. In holding that it was properly allowable as a credit, this court said, l. c. 110,

> "Although a distribution in liquidation of earnings which accrued subsequently to February 28, 1913, does not constitute a dividend in the proper sense of

the term, sub-section F (now sub-section G) *categorically declares that a liquidating* distribution to the extent it is composed of such earnings shall for the purposes of computing the dividends paid credit 'be treated as a taxable dividend paid.'"

"Plainly the Section intends that a distribution of such earnings shall be considered a dividend. Further, it provides that the distributing corporation may use the amount in computing such credits for dividends paid."

The Court of Appeals in the above case (122 F. 2d 361) which also allowed the liquidating distribution as a credit, said l. c. 361,

"We are of opinion, also, that the treatment of the distribution in this case as a taxable dividend paid will not conflict with the purpose of Congress to impose a tax upon undistributed corporate profits * * *.

The distributor, having distributed the property is free from the undistributed profits tax."

In *Commissioner* v. *Kay Manufacturing Company*, 122 F. 2d 443 (C. A. 2), a final distribution of corporate earnings was made in 1937 of profits accumulated since 1933. In holding that the distribution entitled the company to a dividend paid credit, the court said, l. c. 444,

"Literally, the taxpayer's distribution of earned surplus fulfills the provisions of Section 27 F" (now Section 27 G) * * *. "The very purpose of paragraph F was to provide that the liquidating corporation might treat as a 'taxable dividend paid' a distribution of accumulated earnings. * * *"

As pointed out in *Pembroke Realty and Securities Corporation* v. *Commissioner*, 122 F. 2d 252 (C. A. 2), Congress did not intend to impose a surtax penalty on earnings distributed in a complete liquidation of the cor-

poration. Pembroke, a personal holding company, because of losses was bankrupt at the beginning of the tax year but made substantial profits during the year which it included in a liquidating distribution to its stockholders upon its dissolution. Because of its impaired capital, the Commissioner determined that its earnings should be applied to restore its capital, and that the distribution was a distribution of capital and not of accumulated earnings, and therefore was not entitled to credit against the 102 penalties. After pointing out that the purpose of the Act was to require the distribution of earnings, the Court held that Congress did not intend to impose a surtax on a corporation which had distributed all its earnings in liquidation saying, l. c. 254,

> "To us it appears beyond question that the Congress did not intend to impose a penalty tax upon a corporation which in fact distributed all its current earnings to shareholders. The purpose was to induce such distribution, and the tax was laid on 'undistributed' income.
>
> * * * * * * *
>
> There is, however, a broader ground on which the conclusion that Pembroke was not subject to surtax may be supported. This is the ground taken by the Tax Bureau in I. T. 3067, where it was said 'It is obvious that in the case of a complete liquidation of a corporation no income remains undistributed and, therefore, there is nothing to which the undistributed tax is applicable. In this situation it is immaterial whether the prescribed distributions take the form of an ordinary dividend or a distribution in liquidation.' "

That the credit was not intended to be limited to earnings of the current year is further indicated by the Treasury Regulation 111, 29.27 G, as follows,

> "To the general rule that an allowance for dividends paid is permitted only with respect to taxable

dividends paid, Section 27(g) makes one exception, namely, for that part of an amount distributed in liquidation which, under the Internal Revenue Code, constitutes a distribution of, and is properly chargeable to, earnings or profits accumulated after February 28, 1913. Thus, a distribution either in complete or partial liquidation of a corporation is treated by the Code as one constituting in part a distribution of, and being properly chargeable to, earnings or profits,

* * * * * * *

In the case of a distribution in liquidation with respect to which an allowance for dividends paid is permissible the amount of the allowance is equal to the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 2, 1913. To determine the amount properly chargeable to the earnings or profits accumulated since February 28, 1913, there must be deducted from the amount of the distribution that part allocable to capital account.

* * * * * * *

The remainder of the distribution in liquidation is, ordinarily, properly chargeable to the earnings or profits accumulated since February 28, 1913."

As pointed out by the Treasury Regulations, the amount of credit is determined by deducting the part represented by the capital account from the distribution and the balance if consisting of profits accumulated since February 28, 1913, is to be credited in full. That is exactly what petitioner did.

The Court made no distinction between an ordinary dividend and the liquidating distribution. However, a liquidating distribution is not an ordinary dividend and Section 27 G recognizes this fact. A taxable dividend paid is limited by Section B to dividends paid during the taxable year. A liquidation is not a "taxable dividend paid"

and it was not intended that it would be subject to the limitations of a "taxable dividend paid." Section 27 G plainly states that the earnings so distributed shall "for the purposes of computing the basic surtax credit be treated as a taxable dividend paid." In other words for the purposes of determining the basic surtax credit the amount of such distribution shall be treated, that is, entitled to the same amount of credit, as if it were a taxable dividend for that amount.

It is significant that other parts of Section 27 specifically refer to dividends or action taken during the taxable year, as in subsection 27 B, or dividends in kind under 27 D, which are limited to credit for their value "at the time of the payment," or dividends in obligations of the corporation under 27 E, to those "paid in any taxable year"; or credit for stock dividends under 27 F, placing the value thereof at the "fair market value at the time of payment."

The fact that in 27 G Congress specifically omitted any reference limiting the credit to current earnings or profits accumulated in the year in which the liquidation is made, but used broad language allowing the credit for all or "that part of the distribution which was chargeable to the earnings accumulated after February 28, 1913," could only mean it intended that any earnings accumulated after February 28, 1913, which formed a part of a liquidating distribution should be entitled to the credit, which shall be equivalent to the credit that would have been given had the same amount been distributed as an ordinary dividend during the year.

We respectfully submit that the Court failed to give this statute its plain and intended meaning and has failed to follow the interpretation placed upon it by this Court in *Helvering* v. *Credit Alliance Corporation, supra*, and its opinion is in conflict with *Commissioner* v. *Kay Manufac-*

turing Company, 122 F. 2d 443 (C. A. 2). *Pembroke Realty and Securities Corporation* v. *Commissioner*, 122 F. 2d 252 (C. A. 2).

III.

The undisputed facts in the case clearly show that as of July 31, 1948, the company did not have the financial means to declare a dividend in the amount of $453,494.94 as the Court below and the Tax Court held it could reasonably have done. While it is true that its audit disclosed that it had earnings in that amount, the undisputed evidence shows that this included all of its accounts receivable represented by credit sales to its customers which were not due or payable to the company until 30 to 120 days later. Thus on July 31, 1948, the company's surplus or accumulated earnings consisted of $282,844.48 cash and $170,650.46 accounts receivable. Had it distributed every dollar in cash that it had, the maximum distribution that could have been on that date was $282,844.48 and not $453,494.94 on which the surtax was assessed.

In determining the amount of earnings which should have been distributed, the Court only deducted taxes ($277,948.51), accounts payable ($102,620.10) and Miscellaneous item ($184.35) for a total of $380,752.96.

No deductions were allowed or consideration given for other liabilities which the Company had and which no prudent company could have failed to consider, in arriving at the question of whether or not to declare dividends.

The undisputed facts show that for the preceding year the company had rented 37 tank cars belonging to the Grubbs Tank Line of Mercedes, Texas, paying as rental for the use of these and other tank cars the sum of $49,-

333.28. The corporate minutes of the company (R. 33) show that on July 1, 1948 (R. 33), the company was considering the acquisition of storage facilities for fuel oil and tank cars, and that the company had made an offer of $222,000.00 to purchase these tank cars which it had been renting (R. 34).

The minutes of the annual stockholder's meeting of August 2, 1948 (R. 35), show that proposals for the purchase of tank cars were considered. Certainly under these admitted facts the company was not unreasonable in retaining its cash pending the acceptance or rejection of its offer by Grubbs Tank Line.

The undisputed evidence shows that the corporation itself paid income taxes in 1948 totaling $277,948.51 (R. 45) and that it paid an additional income tax of $71,291.37 for the period from August 1, 1948, until it was dissolved March 31, 1949. Mr. Bride personally paid income taxes in 1948 of $7,381.92 and in 1949 when he received the liquidating distribution he paid income taxes of $191,375.65, thus making total taxes of $547,997.45 paid by the company and Mr. Bride from this business. The liquidation distribution to Mr. Bride of the entire earnings of the Company totaled $569,812.46, which less the income tax thereon of $191,375.65 left $378,436.81 which he received subject to the company's contingent liabilities which he assumed. It will thus be seen that the government was the largest participant in the profits of the company and that the operation proved much more profitable to the government than to Mr. Bride and the company combined.

There has been no contention whatever that either the company or Mr. Bride failed to pay sufficient taxes. The only contention is that the company did not distribute its earnings in the fiscal year ending July 31, 1948, and

for that reason was subject to a surtax penalty. Both the Commissioner and the Court below have ignored the fact the company did distribute those very earnings March 31, 1949, and that as a result the Treasury received from the distributee, Mr. Bride, income taxes of $191,375.65. The government is now claiming an additional $163,595.65, not because there were any taxes due from either Mr. Bride or the company, but solely because the distribution was made in March, 1949, instead of July, 1948. It does not deny that it received the money, it merely is asking for a penalty in this amount upon the claim that the money it received in 1949 should have been paid to it in 1948, although it made no claim or objection to the 1949 payment at the time it was received nor for two years thereafter.

The very purpose of Section 102 is to force corporations to distribute their profits and the penalty is intended to apply if there has been an intention to withhold profits unreasonably. Here we have a situation where the profits have been distributed and the government two years later assesses a penalty for failure to distribute the very earnings which had been distributed two years before.

This presents an incongruous situation, which no Court has sustained previously, although the Government has made similar contentions on three previous occasions.

In *Fisher* v. *Kavanaugh*, 100 F. S. 248, a personal holding company was liquidated and took credit for the amount of the liquidation distribution against its net income. The government ignored the distribution and assessed the tax as though no distribution had been made and attempted to collect it from a transferee.

In ruling against the Government, the court said, l. c. 249:

"The levying of a tax on the undistributed profits of a personal holding company when these profits already have been distributed presents an anomalous situation, to say the least. * * *

The purpose of levying the present tax on the corporation was to encourage, if not compel, the distribution of corporate earned surpluses to its shareholders so that the tax could be collected from the shareholders. * * *

Thus we find in the instant matter the taxing authority assuming a position which achieves a result that is completely repugnant to the purpose of the act."

In a somewhat similar case, *Piper* v. *U. S.*, 50 F. S. 363, the Government attempted to assess the surtax penalty where the corporate net income had been distributed in liquidation, saying l. c. 363:

"That which Congress sought to achieve by the Legislation was attained. In effect, however, the Government is now seeking to penalize the Corporation for doing that which the statute intended to produce. The fact that the corporation liquidated at the time the earnings were turned over to the Shareholder is immaterial."

The Tax Court itself in *Gus Blass Company* v. *Commissioner*, 9 T. C. 15, has held that where a dividend distribution had actually been made within a reasonable time after the close of a tax year, it conclusively refuted the charge that the company unreasonably withheld the payment of dividends. The corporate year ended January 31, 1941, and an ordinary dividend was paid some three months later on April 20, 1941.

In holding that the Commissioner's determination of a surtax penalty under Section 102 for failing to declare the

dividend during the fiscal year could not be sustained under the facts, the court said, l. c. 39:

> "The fact that * * * there was no distribution of petitioner's net earnings in the fiscal year ended January 31, 1941, is not determinative of the question involved * * * if during that fiscal year petitioner had no intention of preventing the imposition of surtax on its stockholders by failing to distribute any of its net earnings for that year. * * *
>
> That petitioner had no such intention is, we think, demonstrated by the facts (a) That petitioner awaited the final report of its auditor made after the end of the fiscal year, in order to definitely ascertain its net profits for that year; (b) that the distribution made in April, 1941, was in the identical amount less $444.70 of its net earnings for its fiscal year ended January 31, 1941, and (c) that such distribution was included in the income of petitioner's stockholders for the calendar year of 1941, just as would have been the case had the distribution been received by the stockholders at any time in January, 1941, during the fiscal year of petitioner's ending on January 31, 1941."

The E. L. Bride Company's business affairs were voluminous involving sales of six million dollars per year. It could not determine what its financial position was until an accountant audited its books at the end of the year. It could not tell what its income tax was until the accountant prepared its return which was filed within the time allowed by law on October 14, 1948.

Shortly thereafter the liquidation was decided upon by the stockholders and the earnings distributed in accordance with the law, to which the Commissioner found no objection then or now, other than the present claim that credit should not be allowed under Section 102 because it was not made during the fiscal year.

These undisputed facts have been set forth in support of petitioner's contention that had the Court of Appeals reviewed this cause as required by the law in the same manner as a civil case tried to the Court, such facts under the applicable law would have amply supported petitioner's contentions.

The undisputed evidence is that the company had to pay cash for its purchases from the refineries and that such purchases could not be financed through bank loans or other credit arrangements. The evidence further shows that as of July 31, 1948, the company was committed under written contracts for the purchase of petroleum products totaling $553,395.00 which were scheduled for immediate delivery and for which it would have to pay in cash; that these purchases were in line with its average monthly purchases during the preceding year of $492,941.61. Thus the company's cash on hand was not sufficient to cover its purchases for the next 30 days.

In addition the company was involved in three legal claims totaling $61,407.96 which resulted in litigation as follows:

1. *Kansas City Power and Light Company* v. *E. L. Bride Company,* No. 530694, pending in the Circuit Court of Jackson County, Missouri, in which claim was made against the company for $38,333.70 arising out of contract.

2. The City of Slater, Missouri, had filed suit in the Circuit Court of Saline County, Missouri, to recover $18,-158.07 for fuel oil sold to the City by the Company for which the city was claiming a refund.

3. Ritter and Rundell filed a suit in the District Court of the United States for the Western District of Missouri to recover $4,916.19 for a refund under a fuel oil contract.

The company was seriously considering the acquisition of storage tanks and terminal facilities for the storage and delivery of fuel oil which would have entailed the expenditure of $150,000.00 which had to be postponed because of the shortage of steel (R. 34).

We submit that these undisputed facts justified the company's action in retaining its earnings for the needs of the business then present and reasonably to be anticipated.

The 1954 revenue law expressly provides (T. 26, S. 537) that the term "reasonable needs of the business" includes the "reasonably anticipated needs of the business," so the Code now expressly defines what heretofore was generally accepted as the prevailing rule.

The foregoing liabilities of the Company, fixed and contingent, stand admitted and there is no contention that the company used its funds for an improper purpose, since all of the company's assets were used directly in futherance of the company's business.

The statute contemplates that a company may provide for contingencies, *Cecil B. De Mille*, 31 B. T. A. 1161, Aff. 90 F. 2d 12, cert. denied 302 U. S. 713; *Mead Corporation* v. *Commissioner*, 116 F. 2d 187.

There were no loans to the officers or stockholders. The company had no outside investments and was not using its funds in matters that did not pertain to the operation of its business. There were no withdrawals, personal loans or expenditures for the personal benefit of the officers or shareholders and no investments by the corporation in assets having no reasonable connection with the business as usually found where profits are unreasonably accumulated in violation of Section 102.

Every reasonable indication showed the need for the retention of the company's assets in its business, and there was no evidence whatever to the contrary.

These facts were not considered at all by the Tax Court nor by the Court of Appeals and we submit that they sustain the petitioner's contention that the retention of its earnings was reasonable.

That the company did not intend to withhold the payment of dividends and thereby avoid the payment of surtaxes by its stockholders is conclusively established by the further fact that a short time after the end of its fiscal year when circumstances became such that it could no longer continue doing business in the 16 states in the same manner as it had been accustomed to doing, it actually distributed its earnings to its principal stockholders who duly reported the distribution, and paid all taxes due thereon.

For some unexplained reason, the Court apparently unfamilar with the facts in the record made the unwarranted statement found at page 6 of the opinion to the effect that

> "The only thing shown to have been accomplished by the incorporation of Mr. Bride's personal business was the very great savings of tax to Mr. Bride."

This statement by the Court is not supported by any evidence in the record. There was no evidence whatever as to the size or details of Mr. Bride's personal business and the only reference to it in the Record was that the company after its incorporation bought merchandise in large quantities for cash from the refineries and sold to its customers in small lots on a deferred payment basis the same as Mr. Bride had previously done. The volume of Mr. Bride's business, the amount of taxes paid by him, while he was

engaged in business, are not in issue nor does it appear in the record. The Commissioner made no contention whatever that there was anything illegal in the formation of the corporation. The sole charge and sole issue is whether or not the corporation was availed to unreasonably retain its earnings instead of distributing them and thereby prevent the payment of surtaxes by its stockholders.

Actually the agreed facts show that the incorporation resulted in large taxes for the government and no great savings of taxes to Mr. Bride.

The purpose of Section 102 is to cause companies to distribute earnings so that they can be taxed in the hands of the stockholders.

Reed Drug Co. v. *Commissioner,* 130 F. 2d 288.
U. S. v. *Dakota Tractor Company,* 125 F. 2d 20.

In the instant case this purpose had been fully accomplished. The Company's earnings had been distributed, reported and taxes paid thereon two years before the Commissioner claimed a penalty for not distributing such earnings.

Under the facts the retention of its earnings on July 31, 1948, was reasonable and necessary to meet its fixed and contingent liabilities. The fact that as soon as conditions changed, shortly after that date it did distribute its earnings, should show as a matter of law, that it had no intention to avoid the payment of surtax by its stockholders by withholding its earnings.

It did distribute its earnings to its shareholders, and all taxes were duly paid on the distribution. To penalize a taxpayer for withholding profits which have in fact been distributed is most unjust and clearly contravenes the very intent and purpose of Section 102.

CONCLUSION.

By its refusal to consider the undisputed facts and draw its own conclusions and inferences therefrom, the Court below has denied petitioners a full and lawful hearing of their cause as the code prescribes. The Court had the duty to review the undisputed facts "in the same manner and to the same extent as decisions of the District Court in civil actions tried without a Jury. It could not properly fulfill its duty by declaring in its opinion that "to weigh the evidence, draw inferences from it and declare the result is not the function of this Court."

The Supreme Court has the duty to superintend the Courts of Appeal, and guide them in the exercise of their duties. A failure by a Court to exercise the duty placed upon it by the law operates to defeat justice as much as any excess of authority. It prevents the uniform application of the General Law which is the fundamental basis of democratic jurisprudence.

The conflict with the law is clear and should not be permitted to stand.

On the question of the failure of the company to distribute its profits so as to avoid the imposition of surtaxes on its share holders, the undisputed facts show that the distribution was made and the surtaxes fully paid.

Irrespective of Section 27 G which categorically provides that all profits distributed in a corporate liquidation shall be credited under Section 102. The facts show as a matter of law that the profits were not retained by the company to save taxes for the shareholders, but were in fact distributed and the full taxes paid on the distribution.

It was immaterial whether the liquidation distribution was made before or after July 31, 1945, the close of the

fiscal year, since the tax was at exactly the same rate. Neither the Company nor Bride gained any tax advantage nor did the Government lose any taxes by reason of the fact that the distribution was made March 31, 1949, instead of July 31, 1948. The identical profits were distributed and taxed at exactly the same rate. The very fact that these exact profits were distributed long before any claim by the Government should conclusively refute any charge that the company wrongfully intended to withhold such distribution.

In holding otherwise the Court has failed to apply Section 27 G in accordance with the ruling of this Court in *Helvering* v. *Credit Alliance Corporation*, 316 U. S. 107, and the clear provisions of the Code. Unless the supervisory power of this Court is exercised a clear conflict will exist in the construction of the law and the duties of the Courts of Appeal in the review of decisions of the Tax Court.

We therefore respectfully submit that in order to maintain a uniform and harmonious construction of the laws in question and the Jurisdiction and duties of the Courts of Appeal in all Tax Court appeals, this Court should issue its Writ of Certiorari in this cause.

Respectfully submitted

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APPENDIX.

Internal Revenue Code of 1939:

Chapter 1—INCOME TAX.

* * * * * * * *

SUBCHAPTER B—GENERAL PROVISIONS

* * * * * * * *

Sec. 27 — CORPORATION DIVIDENDS PAID CREDIT.

(a) DEFINITION IN GENERAL—As used in this chapter with respect to any taxable year the term "dividends paid credit" means the sum of:

(1) The basic surtax credit for such year, computed as provided in subsection (b);

* * * * * * * *

(b) (as amended by Section 132 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798) BASIC SURTAX CREDIT.—As used in this chapter the term "basic surtax credit" means the sum of:

(1) The dividends paid during the taxable year, increased by the consent dividends credit provided in Section 28, and reduced by the amount of the credit provided in Section 26 (a), relating to interest on certain obligations of the United States and Government corporations;

(2) The net operating loss credit provided in Section 26 (c) (1);

(3) The bank affiliate credit provided in Section 26 (d)

The aggregate of the amounts under paragraphs (2) and (3) shall not exceed (A) the Section 102 net income for

the taxable year, in the case of the tax imposed by Section 102; (B) the Supplement P net income for the taxable year, in the case of the computations required under Supplement P; or (C) the Subchapter A net income for the taxable year, in the case of the tax imposed under Subchapter A.

* * * * * * * *

(d) DIVIDENDS IN KIND. If a dividend is paid in property other than money (including stock of the corporation if held by the corporation as an investment) the amount with respect thereto which shall be used in computing the basic surtax credit shall be the adjusted basis of the property in the hands of the corporation at the time of the payment, or the fair market value of the property at the time of the payment, whichever is the lower.

(e) DIVIDENDS IN OBLIGATIONS OF THE CORPORATION. If a dividend is paid in obligations of the corporation, the amount with respect thereto which shall be used in computing the basic surtax credit shall be the face value of the obligations, or their fair market value at the time of the payment, whichever is the lower. If the fair market value of any such dividend paid in any taxable year of the corporation beginning after December 31, 1935, is lower than the face value, then when the obligation is redeemed by the corporation the excess of the amount for which redeemed over the fair market value at the time of the dividend payment (to the extent not allowable as a deduction in computing net income for any taxable year) shall be treated as a dividend paid in the taxable year in which the redemption occurs.

(f) TAXABLE STOCK DIVIDENDS. In case of a stock dividend or stock right which is a taxable dividend in the hands of shareholders under Section 115 (f), the amount with respect thereto which shall be used in com-

puting the basic surtax credit shall be the fair market value of the stock or the stock right at the time of the payment.

(g) DISTRIBUTIONS IN LIQUIDATION.—In the case of amounts distributed in liquidation the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall, for the purposes of computing the basic surtax credit under this section, be treated as a taxable dividend paid.

* * * * * * * *

(26 U. S. C., 1952 ed., Sec. 27.)

SUBCHAPTER C—SUPPLEMENTAL PROVISIONS.

* * * * * * * *

SUPPLEMENT A—RATES OF TAX.

* * * * * * * *

Sec. 102. SURTAX ON CORPORATIONS IMPROPERLY ACCUMULATING SURPLUS.

(a) (as amended by Section 103 (d) of the Revenue Act of 1941, c. 412, 55 Stat. 687) IMPOSITION OF TAX. There shall be levied, collected, and paid for each taxable year (in addition to other taxes imposed by this chapter) upon the net income of every corporation (other than a personal holding company as defined in Section 501 or a foreign personal holding company as defined in Supplement P) if such corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders or the shareholders of any other corporation, through the medium of permitting earnings or profits to accumulate instead of being divided or distributed, a surtax equal to the sum of the following:

27½ per centum of the amount of the undistributed Section 102 net income not in excess of $100,000, plus 38½

per centum of the undistributed Section 102 net income in excess of $100,000.

* * * * * * * *

(c) EVIDENCE DETERMINATIVE OF PURPOSE.—The fact that the earnings or profits of a corporation are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid surtax upon shareholders unless the corporation by the clear preponderance of the evidence shall prove to the contrary.

(d) (as amended by Section 202 (b) of the Revenue Act of 1941, *supra*, and Section 138 of the Revenue Act of 1942) DEFINITIONS—as used in this chapter.

(1) SECTION 102 NET INCOME—The term "Section 102 net income" means the net income, computed without the benefit of the capital loss carry-over provided in Section 117 (e) from a taxable year which begins after December 31, 1940, and computed without the net operating loss deduction provided in Section 23 (s), minus the sum of

(A) TAXES—Federal Income, war-profits, and excess profits taxes (other than the tax imposed by Subchapter E of Chapter 2 for a taxable year beginning after December 31, 1940) paid or accrued during the taxable year, to the extent not allowed as a deduction by Section 23, but not including the tax imposed by this section or a corresponding section of a prior income-tax law.

(B) DISALLOWED CHARITABLE, ETC., CONTRIBUTIONS.—Contributions or gifts payment of which is made within the taxable year, not otherwise allowed as a deduction, to or for the use of donees described in Section 23 (o), for the purposes therein specified.

(C) DISALLOWED LOSSES—Losses from sales or exchanges of capital assets which are disallowed as a deduction by section 117 (d).

(2) UNDISTRIBUTED SECTION 102 NET INCOME —The term "undistributed Section 102 net income" means the Section 102 net income minus the basic surtax credit provided in Section 27 (b), but the computation of such credit under Section 27 (b) (1) shall be made without its reduction by the amount of the credit provided in Section 26 (a), relating to interest on certain obligations of the United States and Government corporations.

(3) Title 26, Sec. 1141, U. S. C. A. JURISDICTION— The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in Section 1254, of Title 28, of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. * * *"

(4) TREASURY REGULATION 111, 29.27 G—To the general rule that an allowance for dividends paid is permitted only with respect to taxable dividends paid, Section 27 G makes one exception, namely, for that part of an amount distributed in liquidation which, under the Internal Revenue Code, constitutes a distribution of, and is properly chargeable to, earnings or profits accumulated after February 28, 1913. Thus, a distribution either in complete or partial liquidation of a corporation is treated by the Code as one constituting in part a distribution of, and being properly chargable to, earnings or profits.

* * * * * * * *

In the case of a distribution in liquidation with respect to which an allowance for dividends paid is permissible

the amount of the allowance is equal to the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913. To determine the amount properly chargeable to the earnings or profits accumulated since February 28, 1913, there must be deducted from the amount of the distribution that part allocable to capital account.

* * * * * * * *

The remainder of the distribution in liquidation is, ordinarily, properly chargeable to the earnings or profits accumulated since February 28, 1913.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 359

E. L. BRIDE, INDIVIDUALLY, AND E. L. BRIDE, TRANSFEREE, AND E. L. BRIDE COMPANY BY E. L. BRIDE, TRUSTEE, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 78-90) are not officially reported. The opinion of the Court of Appeals (R. 101-109) is reported at 224 F. 2d 39.

JURISDICTION

The judgment of the Court of Appeals (R. 110) was entered on July 8, 1955. A petition for rehearing

(R. 111-128) was denied (R. 129) on August 1, 1955. The petition for a writ of certiorari was filed on August 30, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether, upon the facts, the court below was correct in affirming the decision of the Tax Court that the taxpayer-corporation in its fiscal year ended July 31, 1948, was availed of for the purpose of avoiding surtax upon its stockholders, by permitting earnings for that period to accumulate beyond its reasonable business needs, within the meaning of Section 102 of the Internal Revenue Code of 1939.[1]

STATUTE INVOLVED

Sections 27 and 102 of the Internal Revenue Code of 1939, the pertinent statutory provisions, are set forth in the Appendix, *infra*, pp. 10-12.

STATEMENT

The only issue before the Tax Court (R. 78) was the existence of surtax liability under Section 102 against the corporation E. L. Bride Company, for the fiscal year ended July 31, 1948.[2] The material facts, as found by the Tax Court (R. 79-85) and as recited by the court below (R. 102-105, 106-107), may be summarized as follows:

---

[1] All Code references herein will be to the Internal Revenue Code of 1939.

[2] The liability of E. L. Bride, the individual, as transferee was conceded before the Tax Court (R. 42, 78), and the Commissioner abandoned his claim for a Section 102 surtax for the taxable period of August 1, 1948, to March 31, 1949 (R. 78).

On July 28, 1947, E. L. Bride formed the corporation, E. L. Bride Company, with a paid-in capital of $25,000. He was president and owned 248 of its 250 shares of stock. The corporation thereafter conducted, in the same manner as before, the business which had been conducted by Mr. Bride for the previous 28 years, buying gasoline and petroleum products from refineries and reselling them to smaller lot purchasers. The corporation had no storage facilities and hence endeavored to resell the products within the time specified by the refineries, so that the products could be shipped directly from the refineries to the corporation's customers. The corporation was obligated to pay the refineries on delivery date, while it resold on a thirty, sixty, ninety or one hundred and twenty day basis. (R. 79-80.)

The corporation was dissolved on March 31, 1949, and its assets were distributed in complete liquidation to Mr. Bride, who assumed all of the corporation's liabilities. The liquidating dividend of $594,812.46 included the entire earned surplus of $569,812.46 accumulated during the corporation's existence, in addition to $25,000 for the stock. That liquidating dividend was the only dividend ever paid by the corporation. (R. 79).

For the fiscal year ended July 31, 1948, the corporation had gross sales amounting to $6,818,078.32, and gross profit of $902,778.97, with a net income of $731,443.45. The corresponding figures for the taxable period from August 1, 1948, to March 31, 1949, were, respectively, $2,568,080.29, $273,630.91 and $187,608.89. (R. 45, 59, 80).

At the end of its fiscal year ended July 31, 1948, the corporation had a cash balance of $694,238.82 (R. 80-81), accounts receivable of $170,660.46, and accounts payable of $102,620.10 (R. 81). Its balance sheet as

of July 31, 1948, showed, in addition to the items of cash and accounts receivable, other assets which brought the total assets to $871,091.08, while its liabilities consisted, in addition to the accounts payable ($102,620.10), of accrued taxes aggregating $289,846.19, an amount due officers of $184.35, the stock liability of $25,000, and "earned surplus and undivided profits" of $453,440.44. (R. 82.)[3]

Because of increasing difficulties in obtaining rail transportation facilities in the spring of 1948, Mr. Bride, the corporation's president, "investigated the possibility" of acquiring storage facilities, and tank cars, but there was no showing that any definite action was ever taken. (R. 83-84.)[4]

The Tax Court found that, for the taxable year ended July 31, 1948, the corporation permitted its earnings or profits to accumulate beyond the reasonable needs of its business, and was availed of for the purpose of preventing the imposition of surtax upon its stockholders through the medium of permitting the earnings or profits to accumulate instead of being divided or distributed. (R. 85.)

Accordingly, the Tax Court upheld (R. 85-90) the imposition of the Section 102 surtax for the taxable year ended July 31, 1948. The Court of Appeals affirmed. (R. 101-109.)

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[3] The balance sheet as of March 31, 1949, showed total assets of $916,737.57, consisting of $784,806.46 cash, $129,720.88 accounts receivable, and $2,210.23 in other assets, while its liabilities consisted of: $101,912.37 for accounts payable, $220,012.74 for taxes, $25,000 for stock, and $569,812.46 earned surplus. (R. 82.)

[4] Corporate minutes of July 1, 1948, and August 2, 1948, indicate, respectively, that Mr. Bride "was instructed to keep up his investigation" and "should continue investigating". (R. 83-84.)

ARGUMENT

Characterizing the Tax Court's findings of fact as "carefully considered" (R. 104), the Court of Appeals affirmed the decision of the Tax Court because it regarded the Tax Court's findings that the corporation permitted its earnings in the taxable year 1948 to accumulate beyond its reasonable business needs and was availed of for the purpose of preventing the imposition of surtax upon shareholders as "supported by substantial evidence." (R. 107.) Further, the Court of Appeals approved as "in accord with the record" the Tax Court's conclusion that the contrary had not been proved by a clear preponderance of the evidence. (R. 107.)

Upon the facts, the court below was clearly correct, for, as it commented (R. 106), this case "seems to present the exact situation" to which Section 102 is addressed. The action of the court below is in accord with a long line of cases (see R. 107-108), in which it has been repeatedly and consistently recognized that, under this statutory provision, whether there is an unreasonable accumulation of profits by a corporation and whether it is availed of for the proscribed purpose of avoiding surtaxes upon the shareholders, are essentially questions of fact, to be determined from all the evidence in each particular case. See *Helvering* v. *Nat. Grocery Co.*, 304 U.S. 282, and *Helvering* v. *Stock Yards Co.*, 318 U.S. 693. (See also the several decisions of lower courts on this point cited by the court below at R. 107-108.)

The suggestion (Pet. 3) that this case "presents no issues of fact since the pertinent facts were agreed to by stipulation * * * [or] were not controverted" is erroneous. The evidence in the case was undisputed or not controverted, as claimed (Pet. 2, 3, 4, 5, 10, 19, 20, 24, 25), only in the sense that there was no directly

contradictory testimony, but, beyond that, the evidence—i.e., the stipulation (R. 40-42) and the exhibits submitted therewith (R. 42-71), the additional matter stipulated orally into the record (R. 23-24), the testimony (R. 24-40) and additional exhibits (R. 72-77) adduced at the hearing—was clearly such as to permit entirely different inferences and conclusions to be drawn, thus leaving a question of fact to be resolved by the trier of the facts. Moreover, a factual issue is not made any less factual merely because the evidentiary facts are stipulated. See *Boehm* v. *Commissioner*, 326 U.S. 287.

1. The first point urged (Pet. 4, 10-12), to the effect that the court below erred in failing to draw its own conclusions in the case, rests upon a plain misconception of the effect of the amendment of Section 1141 (a) of the Code by Section 36 of the Act of June 25, 1948, c. 646, 62 Stat. 869. That amendment was merely a legislative repeal of the restrictive rule of *Dobson* v. *Commissioner*, 320 U.S. 489. See *George Kemp Real Estate Co.* v. *Commissioner*, 182 F. 2d 847, 848-849 (C.A. 2d), certiorari denied, 340 U.S. 852. See also S. Rep. No. 1559, 80th Cong., 2d Sess., p. 13. It did not enlarge the scope of appellate review of Tax Court decisions to the extent of providing for a trial *de novo* in the Courts of Appeals, as in effect claimed below (R. 105) and here (Pet. 2, 4, 10-11).

The opinion of the court below clearly establishes that it exercised fully, and properly discharged, its appellate function. Obviously, its action is not, as claimed (Pet. 11-12), inconsistent with Section 1141 (a) of the Code as amended, nor with the decisions in *Wright-Bernet* v. *Commissioner*, 172 F. 2d 343 (C.A. 6th), or *Gillette's Estate* v. *Commissioner*, 182 F. 2d 1010 (C.A. 9th).

In this connection it may be observed that all of the arguments made under Point III (Pet. 5-10, 19-27) constitute nothing more than, in general, an effort to reargue here the factual issue which was resolved against the petitioners in the court below. Hence, no further comment upon them is deemed warranted.

2. The contention (Point II, Pet. 4-5, 13-19) to the effect that, because of the provisions of Section 27 (g) of the Code, Appendix, *infra*, pp. 10-11 the distribution in liquidation made by the corporation in March of 1949 should have been allowed as a credit for dividends paid during the taxable year ended in July of 1948, had not been raised in the Tax Court (see R. 7, 17, and cf. R. 89 and R. 97), as the court below pointed out (R. 108). However, the court below nevertheless considered it, and found it without merit. (R. 109.)

This contention is based upon a total disregard of the plain terms of the controlling provisions of the statute, Sections 102(d)(2) and 27(b) of the Code, Appendix, *infra*, pp. 12, 10 which make it unmistakably clear that, in arriving at the undistributed net income upon the basis of which a corporation is subjected to Section 102 surtax, the only credit allowable with respect to dividends paid is for dividends *paid during the taxable year.*

Further, this contention is based upon a misconception of the effect of the provisions of Section 27 (g). All that subsection (g) provides is that distributions in liquidation, to the extent that they represent post-1913 profits, may be considered as dividends in arriving at the "basic surtax credit" referred to in subsection (a)(1) of Section 27 (Appendix, *infra*, p. 10), but only to the extent that they were *paid* during the taxable year, as unalterably required by subsection (b) of Section 27. Also, while it is true, as urged (Pet. 16-18), that Section 27 (g) is not limited to a

distribution of profits *earned* during the taxable year, that provision can in no event operate to make a distribution in liquidation—regardless of when the profits being so distributed had been earned—qualify as a proper credit for dividends paid under Section 27 (b) and Section 102 (d)(2) if the distribution is not actually *paid* during the taxable year.

Clearly, on this point, the court below properly applied the statute. The decision below cannot possibly be regarded, as claimed (Pet. 5, 18-19), as inconsistent with *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107, or as in conflict with *Commissioner* v. *Kay Mfg. Corp.*, 122 F. 2d 443 (C.A. 2d), and *Pembroke Realty & S. Corp.* v. *Commissioner*, 122 F. 2d 252 (C.A. 2d). The last case, involving a personal holding company, dealt with a question as to whether a distribution in liquidation could be a "dividend paid" within the meaning of Section 351 of the Revenue Act of 1934, c. 277, 48 Stat. 680, for the purpose of determining whether a personal holding company was subject to tax for failure to distribute its current earnings in the year of liquidation.[5] The other two cases involved not the Section 102 surtax, but the surtax on "undistributed profits" imposed by Section 14 of the Revenue Act of 1936, and both merely presented a question as to whether Section 27 (f) of the 1936 Act covered a tax-free distribution, from one corporation to another, which did not constitute a distribution of earnings for tax purposes. Moreover, the distributions in those cases took place within the taxable year.

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[5] That problem was subsequently laid at rest, by the provision first adopted as Section 27 (f) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, which later became Section 27 (g) of the 1939 Code.

CONCLUSION

The decision below is correct. There is no conflict of decisions and no question calling for review by this Court is presented. The petition should, therefore, be denied.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939:

CHAPTER 1—INCOME TAX

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SUBCHAPTER B—GENERAL PROVISIONS

* * * *

SEC. 27. CORPORATION DIVIDENDS PAID CREDIT

(a) *Definition in General.*—As used in this chapter with respect to any taxable year the term "dividends paid credit" means the sum of:

(1) The basic surtax credit for such year, computed as provided in subsection (b);

* * * *

(b) [as amended by Section 132(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Basic Surtax Credit.*—As used in this chapter the term "basic surtax credit" means the sum of:

(1) The dividends paid during the taxable year, increased by the consent dividends credit provided in section 28, and reduced by the amount of the credit provided in section 26(a), relating to interest on certain obligations of the United States and Government corporations;

(2) The net operating loss credit provided in section 26 (c)(1);

(3) The bank affiliate credit provided in section 26 (d).

The aggregate of the amounts under paragraphs (2) and (3) shall not exceed (A) the section 102 net income for the taxable year, in the case of the tax imposed by section 102; (B) the Supplement P net income for the taxable year, in the case of the computations required under Supplement P; or (C) the Subchapter A net income for the taxable year, in the case of the tax imposed under Subchapter A.

* * * *

(g) *Distributions in Liquidation.*—In the case of amounts distributed in liquidation the part of

such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall, for the purposes of computing the basic surtax credit under this section, be treated as a taxable dividend paid.

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(26 U.S.C. 1952 ed. 27.)

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SUBCHAPTER C—SUPPLEMENTAL PROVISIONS

SUPPLEMENT A—RATES OF TAX

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SEC. 102. SURTAX ON CORPORATIONS IMPROPERLY ACCUMULATING SURPLUS.

(a) [as amended by Section 103(d) of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Imposition of Tax.* There shall be levied, collected, and paid for each taxable year (in addition to other taxes imposed by this chapter) upon the net income of every corporation (other than a personal holding company as defined in section 501 or a foreign personal holding company as defined in Supplement P) if such corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders or the shareholders of any other corporation, through the medium of permitting earnings or profits to accumulate instead of being divided or distributed, a surtax equal to the sum of the following:

27½ per centum of the amount of the undistributed section 102 net income not in excess of $100,000, plus

38½ per centum of the undistributed section 102 net income in excess of $100,000.

(b) *Prima Facie Evidence.*—The fact that any corporation is a mere holding or investment company shall be prima facie evidence of a purpose to avoid surtax upon shareholders.

(c) *Evidence Determinative of Purpose.*—The fact that the earnings or profits of a corporation are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid surtax upon shareholders unless the corporation by the clear preponderance of the evidence shall prove to the contrary.

(d) [as amended by Section 202(b) of the Revenue Act of 1941, *supra*, and Section 138 of the Revenue Act of 1942, *supra*] *Definitions.*—As used in this chapter—

(1) *Section 102 Net Income.*—The term "section 102 net income" means the net income, computed without the benefit of the capital loss carry-over provided in section 117(e) from a taxable year which begins after December 31, 1940, and computed without the net operating loss deduction provided in section 23(s), minus the sum of—

(A) *Taxes.*—* * *

(B) *Disallowed Charitable, Etc., Contributions.*—* * *

(C) *Disallowed Losses.*—* * *

(2) *Undistributed Section 102 Net Income.*—The term "undistributed section 102 net income" means the section 102 net income minus the basic surtax credit provided in section 27(b), but the computation of such credit under section 27(b)(1) shall be made without its reduction by the amount of the credit provided in section 26(a), relating to interest on certain obligations of the United States and Government corporations.

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(26 U.S.C. 1952 ed. 102.)

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